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IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER,
District Attorney, King County, State of New York,

Respondent.

Amicus Brief

[redacted] OF AMERICAN TRIAL LAWYERS ASSOCIATION
[redacted] IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI

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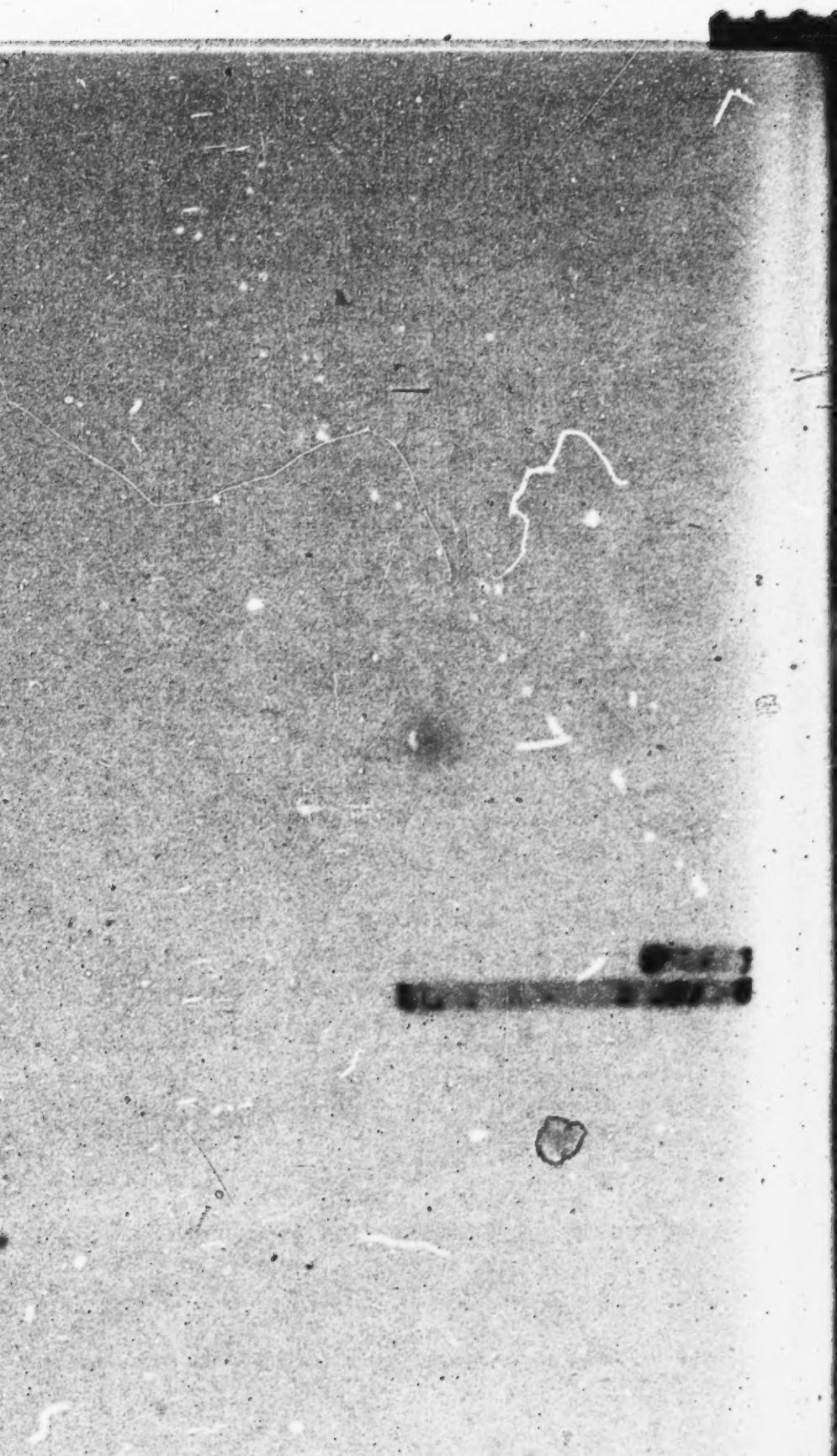

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MOTION OF AMERICAN TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE PETITION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The American Trial Lawyers Association respectfully submits that it is vitally interested in the constitutional question presented by the petition for a writ of certiorari herein for the reasons here stated. This motion is submitted pursuant to and in compliance with Rules 35 and 42 of the Revised Rules of this Court. Both Petitioner and Respondent have consented to the filing of this motion and brief. (Exhibits A and B).

The American Trial Lawyers Association is a national bar association with a current membership of in excess of 14,000. Its membership includes

most of America's leading trial lawyers who generally represent the interests of injured plaintiffs in all fields in which a person may have been harmed wrongfully in his person or property. Its prime function is to preserve the fundamental rights of men through the art of advocacy. Participating in its functions have been members of the judiciary of every State and members of this august body.

It is felt that the question raised by the petition for certiorari squarely presents the fundamental question of the right of the lawyer to be free from undue surveillance by the sovereign.

The lawyer, traditionally, has been the protector of the rights of free men in all recorded civilizations. When despotic governments have sought to stifle freedom and destroy property rights their first target has been the legal profession. Where the lawyers' status has been demeaned and undermined, the status of the judiciary has followed suit. "Peoples Courts" have taken the place of law courts. There is no such thing as independence of the judiciary in the totalitarian states.

This case appears to present facts indicating that the State of New York has sought to breach the right of an individual to be secure in his person, houses, papers and effects, against unreasonable searches and seizures, contrary to the Fourth Amendment to the Constitution. In order to prevent a lawyer from asserting this constitutional right and the protection of the Fifth Amendment, he faces disbarment for failure to "cooperate" with the Bar Association inquiry into his professional conduct. As his livelihood generally depends on his right to pursue the practice of his profession, such lawyer has the choice of *possible* successful defense

after confiscation of his books and records by the Bar Committee, or the *positive* loss of the right to practice his profession by daring to fail to "cooperate" by pleading constitutional rights.

Placing an important and especially sensitive area of our defense mechanism against tyranny in such untenable position would create a dangerous precedent, laying the groundwork for undermining this basic right. At no time since the founding of the Republic has this Court bowed to such pressures. Certainly this day and time of ideological struggle is no time to permit a breach in the constitutional wall set up by our founders for the protection of human rights.

It is for these reasons that the American Association of Trial Lawyers seeks to submit its brief *amicus curiae* in support of the petition for a writ of certiorari.

ISRAEL STEINGOLD
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Norfolk, Virginia
Counsel for American Trial Lawyers Association

BRIEF IN SUPPORT OF MOTION

CONSTITUTIONAL PROVISIONS

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

Amendment XIV, Section 1, Clause 2:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT

This petitioner will address itself solely to the constitutional questions involved rather than to the factual situation for the reasons stated in its Motion for Leave to File Brief in Support of Petition for Certiorari.

A judicial inquiry was ordered by the Appellate Division, Second Department, into solicitation and related practices in Kings County, New York.

As part of this inquiry, on November 15, 1957, David A. Goldner, the petitioner, was served with a subpoena duces tecum requiring him to produce for the

Inquiry's examination, all of his personal and business records, tax returns, bank books, check stubs and cancelled checks for the years 1953 through 1956, inclusive. (Appendix A, Goldner Brief, pp. 1-3). Upon compulsion of disbarment for failure to cooperate with the Judicial Inquiry, Goldner complied with the terms of the subpoena.

The records were admittedly used by the agents of the Judicial Inquiry to frame charges against the petitioner, Goldner.

REASONS FOR GRANTING WRIT

The sweeping nature of the subpoena in this case strikes at the very foundation of the constitutional guaranty of the Fourth Amendment against unreasonable searches and seizures. *Schwimmer v. United States,* (CA8, 1956) 232 F2d 855, 860, certiorari denied 77 S.Ct. 48, 352 U.S. 833, 1 L.ed. 2d 52; *Boyd v. United States,* 116 U.S. 616, 622, 6 S.Ct. 524, 29 L.ed 746.

Granting a *carte blanche* subpoena to any grand jury or bar association to compel production of a lawyer's books, records and personal papers on the theory that the end justifies the means is a moral concept rejected by all, and runs counter to the prohibitions of the Fourth and Fifth Ameidments to the Constitution of the United States. Such lawyer is required by this subpoena to become a witness against himself in a criminal case. *Konigsberg v. State Bar of California,* 353 U.S. 252, 257-258 (1957); *Cohen v. Hurley,* 366 U.S. 117, 123 (1961); *Hudson v. Slade,* 3 Foster and Finlason (Q.B.) 390, 411 (1862).

While there may be specious argument seeking

to differentiate between loss of reputation, property rights and the right to the pursuit of happiness, and actual physical incarceration or a fine, it must be conceded that the difference is purely a play on words. Honesty demands that we recognize truth, and the truth is that there is no material difference between the punishment by disbarment of a lawyer and a horrendous fine. And in order not to be misunderstood, the definition of "horrendous" is, "To be regarded with horror; dreadful; terrible; horrible." (The Century Dictionary).

The respondent will doubtless rely on *Cohen v. Hurley*, 366 U.S. 117, 81 S.Ct. 954, 6 L Ed2d 156, *In re Anastaplo*, 366 U.S. 82 (1961) and *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

For many years the individual states were guided by the holding of this Court in *Wolf v. Colorado*, 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782. Then, in 1961, this Court re-examined the principle and decided that the states are bound by the terms of the Fourth Amendment, reversing *Wolf v. Colorado*. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L.Ed. 2d 1081.

In this time of political confusion, when any person who disagrees with another on important political, social or judicial principles is denounced as a radical, it behooves this Court to defy nomenclature. This petitioner advocates puristic constitutional thinking. If to be a constitutional purist and to demand that we revert to the intent and philosophy of the framers of the Constitution is radical, then by that definition we are radicals. In this class must go the many great dis-

senters whose dissents became the accepted legal philosophy of their successors.

What Justice Black feared in his able and resounding dissent in *Cohen v. Hurley,* supra, has now come to pass.

In that case, a proceeding similar to this, Cohen refused to testify or to produce records. He invoked his state constitutional rights. The penalty was discipline by the New York Appellate Division in the form of disbarment. He was disbarred, not because he invoked his constitutional privilege against self-incrimination, but rather, because he deliberately refused to cooperate with the Court by refusing to waive his constitutional privilege. 366 U.S. at page 122.

Common sense views such shallow argument with amazement. The amazement is all the greater considering the source of such reasoning. Amazement becomes consternation when the United States Supreme Court upholds such blatant defiance of constitutional guaranties on the most invalid of all theories, that a lawyer is not entitled to the protection of the Fourth or Fifth Amendments because of his status as "an officer of the Court."

Fine distinctions have often been drawn between a right and a privilege. Many decisions, among them some relied on by the majority in *Hurley,* have held that a lawyer practices his profession by sufferance. Up to this point this has been true. We now ask this most august tribunal to declare that once a person has been qualified to practice law and has been made a member of the bar, such membership becomes a right, to be lost only by due process of law.

Would any member of this body agree that in an impeachment action by irate congressmen, the constitutional rights of the members attacked be waived or suspended because of their position of sacred trust, or because of the nature of the attack, or that they forfeit their offices by asserting their constitutional rights? The same argument could be used against them as in *Hurley*. Is it valid?

Ununderstandably, the majority in *Hurley* said, (366 U.S. at page 125):

"Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicated not upon any unfavorable inference which it drew from petitioner's assertion of the privilege . . . nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed the Court."

He owed the court no greater duty than any other citizen to assert or waive constitutional rights. That the Court or the organized bar might be thwarted from its purpose to clean up ambulance-chasing, or improper division of fees is of no greater importance than efforts to convict traitors, communists, and felons of all descriptions. All attempts to enforce the law are of importance, some of greater and others of lesser degree. Never is the importance of conviction great enough to justify the suspension of our basic liberties guaranteed by the Bill of Rights. That lawyers as a class have been singled out for that dubious privilege is a degradation undeserved, though it be cloaked as an honor.

The truth is that there are warring factions at the bar. Efforts stemming from high sources seek to

destroy the right to trial by jury. Powerful interests seek to destroy the morale of the trial lawyer by attacks on the contingent fee system, grand jury investigations to determine the source of his business, grand jury investigations to examine his books and records and harrassment by grievance committees. This must inevitably tend to destroy the foundation of the right of all persons to be secure in their papers and effects against unreasonable searches and seizures. Where can the line be drawn which would exclude information of clients' affairs where all of a lawyer's books and records are thrown open to his competitors at the bar? All of this was condoned indirectly in *Cohen v. Hurley*. This petition prays that the Court hear the question as now squarely presented.

In the recent case of *Malloy v. Hogan*, 84 S.Ct. 1489, U.S. , L Ed2d , (1964), this Court, adhering to the principle that it will not perpetuate error merely for the sake of historical continuity, said:

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme. Thus, although the Court as late as 1922 said that 'neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' * * * Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543, 42 S. Ct. 516, 522, 66 L. ed. 1138, initiated a series of decisions which today holds immune from State invasion every First

Amendment protection for the cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association and petition for redress of grievances.

"Similarly, Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, decided in 1938, suggested that the rights secured by the Fourth Amendment, were not protected against state action, citing at 302 U.S. 324, 58 S.Ct. 151, the statement of the Court in 1914 in Weeks v. United States, 232 U.S. 383, 398, 34 S. Ct. 341, 346 that "the 4th Amendment is not directed to individual misconduct of [state] officials." In 1961, however, the Court held that in the light of later decisions, it was taken as settled that "* * * the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth * * * ." Mapp v. Ohio, 367, U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed. 2d 1081. Again, although the Court held in 1942 that in a state prosecution for a non-capital offense, "appointment of counsel is not a fundamental right," Betts v. Brady, 316 U.S. 455, 471, 62 S. Ct. 1252, 1261, 86 L.Ed. 1595; cf. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, only last Term this decision was re-examined and it was held that provision of counsel in all criminal cases was "a fundamental right, essential to a fair trial," and thus was made obligatory on the States by the Fourteenth Amendment. Gideon v. Wainwright, 372 U. S. 335, 344-345, 83 S.Ct. 792, 796.

"[1] We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment

against abridgment by the States. Decisions of the Court since Twining and Adamson have departed from the contrary view expressed in those cases. We discuss first the decisions which forbid the use of coerced confessions in state criminal prosecutions."

We therefore, humbly submit that the Court weigh, with greatest consideration, the words of Justice Black in his scholarly and documented dissent in *Hurley,* (366 U.S. at page 138),:

"I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become

nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.

"Nor do I believe, as the majority asserts, that the discrimination here practiced is justified by virtue of the fact that the courts of England have for centuries exercised disciplinary powers "over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." The rights of lawyers in this country are not, I hope, to be limited to the rights that English rulers chose to accord to their baristers hundreds of years ago For it is certainly true that the courts of England could have then, as the majority points out, made "short shrift" of any barister who refused to "co-operate" with the King's courts. Indeed, those courts did sometimes make "short shrift" of lawyers whose greatest crime was to dare to defend unpopular causes. And in much the same manner, these same courts were at this same time using their "inherent" powers to make "short shrift" of juries that returned the wrong verdict. History, I think, records that it was this willingness on the part of the courts of England to make "short shrift" of unpopular and uncooperative groups that led, first, to the colonization of this country, later, to the war that won its independence, and, finally to the Bill of Rights."

The fear expressed by Justice Black, that this sur-

render of lawyers' constitutional rights would be enlarged and expanded, was a foreboding based on undefiable logic. The question today is here before the Court. He said:
(366 U.S. at p. 143):

> "It is, of course, possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the lawyer's independence. But I find no such promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of "co-operation," even to the destruction of constitutional safeguards, and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. Could a lawyer who refused to "co-operate" now be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute "shady practices"?

CONCLUSION

It should be apparent from the foregoing that the position of the legal profession is in danger of being devitalized on the altar of a misguided obeisance to outmoded medieval concepts. The subservience of the lawyer to the will and tyranny of the sovereign bodes ill to the liberties of all free men won at Runnymede and at Yorktown. When we strip the defender of his arms we destroy the rights of those he seeks to defend. A cowed legal profession is impotent. Each corroding step leads but to the next.

This petitioner joins in the prayer that writ of

certiorari issue so that America's lawyers may be declared persons equal in rights to all other persons, and thereby, that the role of the legal profession in our Republic be maintained and reinvigorated. For there can be no rule of law without the free and independent lawyer to nurture it.

AMERICAN TRIAL LAWYERS ASSOCIATION
By ISRAEL STEINGOLD,
Counsel
319 Western Union Building
Norfolk, Virginia

CONSENT

In re: David A. Goldner v. Edward S. Silver, etc.
Supreme Court of the United States
No. 415, October Term, 1964

To Whom It May Concern:

The undersigned, counsel for petitioner in the above-captioned matter, hereby consents to the appearance *amicus* of the American Trial Lawyers Association.

BERNARD A. BERKMAN
1320 The Superior Building
Cleveland, Ohio 44114

October 22, 1964

Exhibit A

SUPREME COURT OF THE UNITED STATES

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County,
State of New York,

Respondent.

The undersigned, counsel for Respondent, in the above entitled action, hereby consents to the filing of a brief Amicus Curiae by the American Trial Lawyers Association in support of the petition for a Writ of Certiorari, in the above entitled proceeding.

AARON E. KOOTA,
Acting District Attorney,
Kings County

By STANLEY M. MEYER,
Assistant District Attorney

Dated: October 21, 1964
Brooklyn, New York

Exhibit B